Smith v. The Abandoned Vessel Doc. 37

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NATHAN SMITH	§	
Plaintiff	§	
	§	
V.	§	**CIVIL ACTION H-07-784**
	§	
THE ABANDONED VESSEL,	§	
In rem	§	
Defendant.	§	

FIRST AMENDED ORIGINAL COMPLAINT

Comes Now, Nathan Smith, and files this his First Amended Original Complaint and would show the Court as follows:

PARTIES

1. Plaintiff, Nathan Smith, is an individual residing in Los Angeles, California.

2. Defendant, the Abandoned Vessel, in rem, is an abandoned and derelict merchant vessel ("VESSEL") located at or about Refugio County, Texas in the vicinity of the Mission River.

3. Defendant, Killeen & Stern, PC ("K&S"), is a professional corporation organized and existing under the laws of Texas with its principal place of business in Texas. K&S may be served by serving its registered agent, Joseph

Dockets.Justia.com

G. Epstein, 700 Louisiana Street, Suite 4200, Houston, Texas 77002.

4. Intervener, Marie Sorenson, is an individual residing in the State of Texas, and may be served through its counsel, Ronald B. Walker and Terry M. Carroll, Jr., Walker, Keeling & Carroll, L.L.P., 210 E. Constitution, P. O. Box 108, Victoria, Texas 77902-0108.

JURISDICTION

5. This action is within the admiralty and maritime jurisdiction of this Court within the meaning Federal Rule of Civil Procedure 9(h) and the Supplementary Rules of Certain Admiralty and Maritime Claims and in particular, Rules C and D.

6. The VESSEL is located within navigable waters of the United States such that a person could travel by boat from the VESSEL to the Mission River, from the Mission River to the Gulf of Mexico and other states in the United States.

FACTS

7. The remains of the VESSEL, including her armament, apparel, tackle, and cargo are, on information and belief, all abandoned maritime property, found, discovered, and confirmed by Mr. Smith.

8. Mr. Smith is the first finder and the only party which has discovered and/or engaged in salvage operations of the VESSEL, her armament, apparel, tackle, and cargo.

9. Mr. Smith has invested substantial time, money and effort to locate and initiate the physical recovery of the VESSEL, her armament, apparel, tackle, and cargo.

10. Mr. Smith is the owner of or has access to certain salvage vessels, salvage equipment, and has brought together an archaeological team including engineers, archaeologists, historians, and technical assistants to conduct exploration and excavation of the VESSEL consonant with proper archaeological and historian principles.

11. Mr. Smith is actively, voluntarily and successfully engaged in the process of reducing the VESSEL, her armament, apparel, tackle, and cargo to his exclusive custody, control, possession and dominion as the natural salvaging circumstances permit, and Mr. Smith has the present ability and intention to continue to do so during the pendency of this action.

12. Mr. Smith's services, skills and expenditure of time and money are of the highest order of merit.

COUNT ONE
POSSESSORY AND OWNERSHIP CLAIM
PURSUANT TO THE MARITIME LAW OF FINDS

13. Mr. Smith incorporates by reference the allegations in paragraphs 1 through 12 above.

14. Mr. Smith is the rightful salvor of the VESSEL, her armament, apparel, tackle, and cargo and is taking such actions as are necessary to constitute dominion and control over the vessel.

15. As there is no extant owner of the VESSEL, her armament, apparel, tackle, and cargo, and it has been abandoned, Mr. Smith is entitled to the exclusive title, ownership and possession of the VESSEL pursuant to the maritime law of finds and under the protection of this Court.

COUNT TWO
SALVAGE AWARD CLAIM

16. Mr. Smith incorporates by reference the allegations in paragraphs 1 through 12 above.

17. The VESSEL, her armament, apparel, tackle, and cargo are a marine peril and are in an utterly helpless condition from which they cannot be rescued without the voluntary and successful services of Mr. Smith.

18. Mr. Smith is under no legal obligation or official duty to render salvage services to the VESSEL.

19. Mr. Smith's services have been and will continue to be successful in locating, rescuing and/or helping rescue the VESSEL, her armament, apparel, tackle, and cargo.

20. The vessel has been abandoned.

21. Mr. Smith, by virtue of such services so performed, the private risk capital expended, the time spent, and the danger incurred in finding and salvaging the VESSEL, is entitled to the exclusive title, ownership and possession of the vessel or, alternatively, a liberal and competent salvage award for such services.

COUNT THREE
DECLARATORY RELIEF: THE VESSEL

22. Mr. Smith incorporates by reference the allegations in paragraphs 1 through 21 above.

23. This Court has jurisdiction over this action for declaratory judgment pursuant to 28 U.S.C. § 2201 for the purpose of determining a question of actual controversy between Mr. Smith and all third parties who may hereafter appear.

24. Without a declaration by this Court regarding the abandonment of the

VESSEL, Mr. Smith will be unsure as to his title in the VESSEL.

25. Mr. Smith requests that this Court enter judgment declaring that all third parties have totally and completely abandoned the VESSEL, her armament, apparel, tackle, and cargo and therefore have no right, title or interest in her whatsoever.

26. The Court's making this declaration will confer certainty on Mr. Smith with respect to his rights to the VESSEL, her armament, apparel, tackle, and cargo and will therefore serve the interests of justice.

COUNT FOUR
SALVAGE OPERATION AND INJUNCTIVE RELIEF CLAIM

27. Mr. Smith incorporates by reference the allegations in paragraphs 1 through 21 above.

28. The rights and efforts of Mr. Smith, the economic value and integrity of the VESSEL, her armament, apparel, tackle, and cargo, the successful recovery of lost and abandoned property from marine peril, and the safety of life and limb mandate that Mr. Smith be protected by the Court in maintaining exclusive dominion and control of his salvage activities on the VESSEL without the interference by third parties.

29. Allowing interference with Mr. Smith's ongoing operations would substantially and irreparably injure Mr. Smith, would be inequitable, would be harmful to the public good, would constitute a significant hazard to safe successful salvage operations, and would be contrary to a balancing of respective interest of the parties and comparative hardships borne.

30. Because of the unique historical and archaeological significance of the VESSEL, Mr. Smith has no adequate remedy of law to compensate him for losses which may be occasioned by said interference by third parties.

31. In order to adequately protect the security and the archaeological integrity of Mr. Smith's salvage operation, this Court should enter a preliminary injunction prohibiting any third parties from: in any way touching or causing mechanical devices to touch the VESSEL, and conducting search, scuba diving and/or salvage operations within one (1) nautical mile of the vessel.

COUNT FIVE
DECLARATORY RELIEF: THE CONTRACT

32. Mr. Smith incorporates by reference the allegations in paragraphs 1 through 31 above.

33. An actual, present, and existing controversy exists between Mr. Smith and K&S regarding the existence and scope of K&S's interest, if any, in any recovery Mr. Smith receives in connection with this action.

34. K&S entered into a contract with Mr. Smith to provide legal services in an effort to enforce Mr. Smith's rights set forth above (the "Contract"). A copy of the Contract is attached as Exhibit A and incorporated by reference as if fully set forth herein.

35. Specifically, K&S agreed to protect Mr. Smith's interests and "to investigate, prosecute and collect, whether by suit, compromise or otherwise, client(s)' claim(s) relating to the salvage/ownership of an unidentified wrecked and abandoned Spanish ship located in or near Refugio County, Texas."

36. K&S further agreed

> to take all steps deemed by it to be necessary and appropriate to obtain satisfactory result for [Mr. Smith], including but not limited to, securing a complete investigation of the claim, instituting legal proceedings, employing expert witnesses and associate counsel, entering into settlement negotiations, preparing settlement packages, preparing for and proceeding to trial, and discontinuing the claim or litigation.

37. In consideration for these services, the contract provides for K&S to receive:

> **Thirty three and one-third percent (33 1/3%)** of amounts up to $100,000,000.00
> **Twenty five percent (25%)** of amounts $100,000,000.01 up to $1,000,000,000.00
> **Fifteen percent (15%)** of amounts $1,000,000,000.01 up to $3,000,000,000.00
> **Ten percent (10%)** of all amounts greater than $3,000,000,000.00
>
> of the gross recovery whether salvage and/or ownership rights are determined before suit has been filed, or whether such rights are determined after suit is filed.

It further purports to assign K&S this interest.

38. On March 6, 2007, K&S filed an Original Complaint on Mr. Smith's behalf.

39. On September 7, 2007, the Court signed an Order on Entry of Judgment and Declaratory Judgment in Mr. Smith's favor.

40. On September 11, 2007, Intervener, Marie Sorenson, filed a Plea in Intervention, Opposed Motion for New Trial, Plea to the Jurisdiction, Motion to Transfer Venue, and Objection to Mr. Smith's Motion for Declaratory Judgment with Orders.

41. K&S failed to file any response to these motions on Mr. Smith's behalf.

42. On September 14, 2007, the Court signed the Order Vacating the Order on Entry of Judgment and Declaratory Judgment entered on September 7, 2007.

43. Shortly after the Court signed that order, K&S informed Mr. Smith that the Court transferred his case changing the venue from the Southern District of Texas, Houston Division to the Southern District of Texas, Victoria Division. This was not in fact true.

44. K&S breached the standard duty of care it owed to Mr. Smith in at least the following respects:

a. K&S failed to respond to critical motions filed by Intervener as it represented to Mr. Smith it would do;
b. K&S provided erroneous information to Mr. Smith regarding the case;
c. K&S failed to adequately communicate with Mr. Smith; and
d. K&S improperly managed the litigation.

45. Due to the foregoing, Mr. Smith discharged K&S and retained new counsel.

46. On September 18, 2007, K&S filed its Motion to Withdraw as Counsel asserting that Mr. Smith had discharged K&S from the case and that Robert J. Killeen, JR. had terminated representation pursuant to the Contract. With respect to client discharge, the Contract states

> Client(s) has the right to discharge the Firm at any time. In the event that the Firm has not otherwise materially breached this Agreement, if Client(s) terminates this Agreement without the written consent of the Firm, then the Firm shall have the right to terminate all of its remaining rights, duties and obligations hereunder. **However, Client(s) agrees that they must pay the Firm for expenses incurred through the date of discharge and, unless the Firm's discharge is determined to be for good cause by a court of competent jurisdiction, the Firm shall still be entitled to the percentage of Client(s)' ultimate recovery described above.**

47. K&S has not responded to numerous attempts by Mr. Smith's counsel to contact it regarding the Contract.

48. Mr. Smith's new counsel is responsible for performing all the services which K&S originally agreed to provide and must complete all of the activities associated with this type of litigation, including retaining experts and conducting discovery.

49. Despite the fact that new counsel will be providing the services required to pursue Mr. Smith's rights, the Contract states K&S may retain up to a 33.3 percent interest in any recovery by Mr. Smith.

50. To allow K&S to retain an interest in Mr. Smith's recovery after K&S's breach of its duties to Mr. Smith and without K&S providing any services of value, would be unconscionable. There is no reasonable or subjective parity between the services actually provided by K&S and the amount of compensation received. As a result, the Contract is unconscionable and unenforceable.

51. Pursuant to 28 U.S.C. §§ 2201 and 2202, Mr. Smith is entitled to a judgment declaring the rights and obligations of Mr. Smith and K&S with respect to the Contract and, specifically, that:

a) the provision of the Contract allowing K&S to retain any right to a percentage of Mr. Smith's ultimate recovery is unconscionable and, as a result, unenforceable; and

b) K&S has no right to any percentage of Mr. Smith's ultimate recovery in this action.

52. In the alternative, if this Court finds the Contract enforceable, Mr. Smith is entitled to a judgment declaring that:

a) K&S breached the standard duty of care it owed Mr. Smith;

b) K&S's breach provided Mr. Smith with good cause to discharge K&S; and

c) because Mr. Smith discharged K&S for good cause K&S has no right to any percentage of Mr. Smith's ultimate recovery.

PRAYER

53. WHEREFORE, Mr. Smith prays:

a) That this Court enter judgment declaring Mr. Smith to be the true, sole and exclusive owner and possessor of the VESSEL, her armament, apparel, tackle, and cargo; or, in the alternative,

b) That Mr. Smith be awarded a liberal salvage award in specie, with the amount and/or composition of such award as may be determined by this Court pursuant to the law of salvage; and

c) That this Court enter judgment declaring that Mr. Smith is entitled to the sole and exclusive right to continue his ongoing recovery operations and to salvage, preserve, transact and otherwise handle the VESSEL without interference by third persons or parties, and that any and all such interference be temporarily and permanently enjoined; and

d) That, pursuant to Supplemental Rule C(3), process *in rem* and a warrant of arrest may issue in due form of law, in accordance with the practice of this Honorable Court in causes of admiralty and maritime jurisdiction against the VESSEL and/or salvage from the VESSEL, her armament, apparel, tackle, and cargo, with notice to all persons claming an interest therein to appear and answer this Complaint and to show cause as to why the VESSEL, her armament, apparel, tackle, and cargo should not be: (1) delivered to Mr. Smith as having full ownership, title and right to possession thereof, or (2) alternatively, sold or appropriately disposed of in satisfaction of any judgment in favor of Mr. Smith for a salvage award; and

e) That this Court enter judgment declaring that the provision of the Contract allowing K&S to retain any right to a percentage of Mr. Smith's ultimate recovery is unconscionable and, as a result, unenforceable; or, in the alternative,

f) That this Court enter judgment declaring that K&S breached the standard duty of care owed to Mr. Smith, K&S's breach provided Mr. Smith with good cause to discharge K&S and, as a result, K&S has no right to a percentage of Mr. Smith's ultimate recovery; and

g) That Mr. Smith may have such other and further relief, legal or equitable, special or general, or in admiralty, as the justice of this cause may require.

Respectfully submitted,

/s/ *Richard A. Schwartz*
Richard A. Schwartz
Federal Bar No. 3647
State Bar No. 17864950
Schwartz, Junell, Greenberg &
Oathout, L.L.P.
909 Fannin, Suite 2700
Houston, Texas 77010
Telephone No. (713) 752-0017
Telecopier No. (713) 752-0327

Attorney for Plaintiff, Nathan Smith

CERTIFICATE OF SERVICE

I certify that the foregoing Plaintiff's First Amended Original Complaint has been served on the following counsel:

Ronald B. Walker
Terry M. Carroll, Jr.
Walker, Keeling & Carroll, L.L.P.
210 E. Constitution
P. O. Box 108
Victoria, Texas 77902-0108

by U. S. First Class Mail on the 31st day of January, 2007.

/s/ Richard A. Schwartz